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No. 80-1801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OVERSEAS RALEIGH MANUFACTURING, LTD.,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETER K. LEISURE
Attorney for Respondent
WHITMAN & RANSOM
522 Fifth Avenue
New York, New York 10036
(212) 575-5800

(11034)

QUESTION PRESENTED FOR REVIEW

Whether a shipper possesses a remedy for an air carrier's alleged fraudulent misquotation of its tariff rates in an action by the carrier to enforce its lawful tariffs.

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PAN AMERICAN WORLD AIRWAYS, INC.,

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BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

Petitioner, Overseas Raleigh Manufacturing, Ltd., seeks a writ of certiorari to the Court of Appeals of the State of New York to review a decision of that Court holding petitioner liable for the charges specified in the filed tariffs of respondent, Pan American World Airways, Inc., and affirming the dismissal of petitioner's counterclaim sounding in fraud. (17a-20a).*

Course of the Proceedings

This action was commenced by respondent in the Supreme Court of the State of New York for judgment in the sum of $248,839.03, representing the difference between respondent's posted tariffs for the shipment of clothing by petitioner

*References in the form "__a", e.g., "17a", are to petitioner's appendix; references in the form "__ra" are to respondent's appendix.

between Frankfurt, Germany and New York and the payments made by petitioner for those shipments. Petitioner interposed a counterclaim for the precise amount demanded by respondent, alleging that respondent had perpetrated a fraud by failing to inform petitioner that an alleged oral "unit rate agreement" made by the parties was unlawful and in violation of respondent's tariffs.

Dispositions Below

In two unreported opinions (1a-8a), nisi prius held petitioner liable for the unpaid portion of respondent's tariff, but denied summary judgment to respondent on the counterclaim. On cross-appeals, the Appellate Division affirmed the grant of summary judgment in favor of respondent and held that petitioner was barred from interposing its counterclaim as it

constituted an impermissible attack on the validity of the tariffs. 73 App. Div. 2d 879 (1st Dep't 1980) (9a-16a). The New York Court of Appeals affirmed the relevant portions of the order of the Appellate Division, 51 N.Y.2d 960 (1980) (17a-20a), and denied petitioner's motion for reargument on January 20, 1981 (21a).

Statement of Facts

Respondent is an international air carrier duly certified under the Federal Aviation Act, 49 U.S.C. §§ 1301, et seq., and operating under and subject to the rules and regulations of the Civil Aeronautics Board and Federal Aviation Administration. Petitioner is an importer of ready-made clothing from Roumania.

In or about February, 1976, Henry Shapiro, president of petitioner, and a Mr. King, while in-flight to Bucharest

were approached by Joseph Basso, respondent's Roumanian cargo representative, for the purpose of solicitation of air freight business. Shortly thereafter, Messrs. Shapiro and King met with Basso in Bucharest. Shapiro informed Basso that petitioner would be willing to transfer its air freight business from KLM Royal Dutch Airlines to respondent if a satisfactory arrangement could be made.

Although informed that respondent's tariff provides for transportation charges only by weight, Shapiro requested a quote of the cost of transportation by garment unit based upon the estimated weight of each shipment. Basso informed Shapiro and King that respondent's tariff rates from Bucharest were not "competitive" (8 ra), but that he would explore the possibility of shipping the goods from Frankfurt, Germany (after trucking

them there at respondent's expense), where special commodity rates for large tonnage shipments might be available. (Id.) Based upon information supplied by Shapiro, Basso established the weight of the garments (suits and blazers) for the purpose of computing the unit cost of shipment within respondent's filed tariff rates. (11a).

Thereafter, Shapiro and Basso travelled to Frankfurt to determine the ultimate freight cost on a unit basis based upon the tonnage rate of respondent's special commodity tariff between Frankfurt and New York. Based upon information supplied by Shapiro, respondent apportioned the weight of each container to be transported among suits and blazers in a fixed ratio to arrive at a unit cost consistent with its filed weight tariffs. (11a, 13ra-17ra). That

the parties intended the cost of transportation at all times to be based upon the tonnage rate of respondent's special commodity tariff between Frankfurt and New York is made plain by the pretrial testimony of petitioner's president, Henry Shapiro (Respondent's Appendix before New York Court of Appeals, at 1):

> Q. I am asking you again what you told him. [Shapiro told Basso]
>
> MR. GALLAGHER (Petitioner's attorney): What did you tell him?
>
> A. I told him, this is how much suits [sic] I manufacture in Roumania. He says, if he could get that kind of load factor he would handle it at $1.25 and $1. He said, at that tonnage rate. (Emphasis supplied.)
>
> Q. What was your quantity that you manufactured, that you told him?
>
> A. A minimum of ten to fifteen thousand suits a week, a minimum.
>
> Q. How much did that come to in weight?
>
> A. I don't know.

Q. Did you tell him how much a suit weighed?

A. No, that's his job.

Q. Did he know how much a suit weighed?

A. That is how he came to the rate of $1. and $1.25, he weighed the garments. (Emphasis supplied.)

Petitioner actually shipped a disproportionate number of heavier garments than it had represented would be shipped. Hence, the underpinnings of the unit price agreement, which was based upon petitioner's shipment of lightweight garments, did not comport with respondent's filed tariffs. Accordingly, respondent's air waybills, which were based upon weight only in accordance with its tariffs, were higher than they would have been based upon the unit price. (11a-12a).

On November 15, 1976, fearing that the actual unit prices of each garment

would not average out in conformity with respondent's filed tariffs, Basso sent a telex to petitioner, requesting advice as to the status of the shipments of lightweight sport coats and blazers upon which the unit price figures had been based, and when no reply was received, repeated the inquiry on November 22, 1976. Having received no substantive response to these two telexes, Basso advised petitioner on December 21, 1976 that effective January 1, 1977 all shipments would be rated by actual weight. He finally advised petitioner that all further shipments would be stopped. Thereupon petitioner responded by telex that "we will be in Bucharest" on January 13, 1977, and would meet with Basso and asked him "do not do anything hastily" to interrupt the flow of shipments. Basso testified that in that meeting Shapiro agreed to pay the

freight charges by actual weight, but when petitioner thereafter refused to pay the amount specified in respondent's tariff, petitioner's credit was cancelled, and it was required to pay cargo charges at full tariff rates on all further shipments in advance by cash or certified check.

It is undisputed that the total freight charges, as measured by respondent's Frankfurt to New York special commodity tariff, amount to $802,349.84. It is similarly beyond dispute that petitioner paid respondent only the sum of $553,510.81, based upon its claim that the transportation charges were to be computed, not under the tariff, but rather pursuant to a separate unit rate agreement. In defense of this action by respondent to recover the difference between its published tariff rate and the

amount paid by petitioner, petitioner interposed a counterclaim "bottomed on common law fraud," demanding judgment in the precise amount sued for by respondent. The gravamen of this counterclaim was that petitioner relied on allegedly false statements of Basso that there were special tariff rates in Frankfurt that could be utilized to accommodate petitioner's shipments at unit rates, when in fact no such special tariffs existed.

In essence, then, petitioner seeks to enforce an alleged "unit rate" transportation agreement despite its concession that such charges could not be charged by respondent or paid by petitioner, as respondent's filed tariff rates, which as a matter of law constituted the contract of the parties, are based upon weight alone. While petitioner

professes not to "attack the validity or conclusiveness of the tariffs," it seeks to circumvent their conclusive effect by the simple expedient of interposing a "counterclaim bottomed on common law fraud."

In this regard, we respectfully submit that in framing its "Question Presented" to this Court, petitioner has misstated the undeniable facts in the record by presenting an inaccurate indented, single-spaced paragraph of "virtually conceded" facts (so as to create the false impression of a verbatim quote from the holding of an unidentified New York State Court). Two particularly misleading portions of that statement merit special response.

First, the underpaid freight charges respondent commenced this action to collect are not based upon the "Bucharest

filed tariff kilo rates," but the Frankfurt to New York tariff (tonnage) rate; and, second, the discussions in Frankfurt did not culminate in a "unit rate agreement," but were calculations to bring petitioner's per unit transportation costs within respondent's filed tonnage tariff from Frankfurt to New York. (11a-12a).

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate that the New York Court of Appeals has decided a federal question in a way to conflict with the decision of another state court of last resort or of a Federal court of appeals or that its decision presents an important, undecided question of Federal law. Sup. Ct. R. 17. Indeed, precisely the opposite is true. The decision of the Court of Appeals is unassailable, as it comports with numerous decisions of this Court, every Federal

court of appeals which has decided the issue presented in this petition and Federal law.

The essence of petitioner's argument may be readily distilled. Petitioner maintains that it shipped goods on respondent's flights in reliance on an alleged oral agreement for "unit" freight rates outside of respondent's admittedly valid tariff. Petitioner concedes, as it must, that the alleged agreement for "unit" rates is unenforceable as a matter of law. Barred from attacking the tariff itself, petitioner maintains that it was fraudulently induced to have respondent ship its goods as it relied on statements allegedly made by respondent's Roumanian cargo representative that the goods could be transported at a rate outside the applicable tariff.

As petitioner notes, the Court of Appeals held that petitioner's counterclaim, "bottomed on common law fraud," was nothing more than an attempt to attack the reasonableness of the tariff indirectly when it was barred from doing so directly (18a-20a). Petitioner maintains, however, that in so holding the Court of Appeals ignored the impact of section 1106 of the Federal Aviation Act, 49 U.S.C. § 1506, which provides:

> Nothing contained in this chapter [the Federal Aviation Act] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. (Emphasis supplied.)

By its plain terms, section 1106 merely provides that remedies existing at common law or some other statute at the time of the enactment of the Federal Aviation Act are not abrogated. What was

preserved, therefore, were "pre-existing remedies, not pre-existing obligations or rights or contractual arrangements." Mack v. Eastern Airlines, 87 F. Supp. 113, 115 (D. Mass. 1949) (Wyzanski, J.). Thus, only to the extent that Congress itself has not specified the rights and obligations of the parties to a contract of carriage or delegated the authority to do so to an administrative agency, may a common law action be maintained consistent with the purposes of the Act. Nader v. Allegheny Airlines, 426 U.S. 290, 298-300 (1978); Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, 1314-15 (9th Cir. 1977).

In chosing to regulate all modes of transportation in interstate commerce, whether that industry be motor carriers, railroads, water carriers, or air carriers, Congress sought to combat the

pernicious effects of preferential treatment among shippers and price discrimination. Pittsburgh, C.C. & St. L. Ry. v. Fink, 250 U.S. 577, 581 (1919); North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 233-34 (2d Cir. 1978). To this end, every regulatory act contains a provision that the carrier's filed tariff, and the tariff alone, governs the rights and obligations of the parties to a contract of carriage.* Thus, a duly filed tariff,

> is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travellers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse

*49 U.S.C. §§ 6, 8, 9, 41-43 (railroads); 49 U.S.C. §§ 317, 318, 322 (motor carriers); 49 U.S.C. §§ 906, 916, 917 (water carriers). Indeed, failure of a carrier to charge the tariff rate subjects it to severe criminal penalties. 49 U.S.C. §§ 41-43, 1472(a).

> for paying or charging either more or less than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N.R.R. v. Maxwell, 237 U.S. 94, 97 (1919) (emphasis supplied); accord, David v. Cornwell, 264 U.S. 560 (1924); Southern Ry. v. Prescott, 240 U.S. 632 (1916).

In the instant case, the rights and obligations of the parties are governed exclusively by the provisions of the tariff. Respondent was prohibited charging* and petitioner was prohibited from

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*49 U.S.C. § 1373(b)(1) provides, in pertinent part:

> No air carrier or foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates,

paying* any charge for the transportation of its goods which deviated from the

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> fares, and charges specified in then currently effective tariffs of such air carrier or foreign air carrier; and no air carrier or foreign air carrier or ticket agent shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extent to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs except those specified therein.

*49 U.S.C. § 1373(b)(2) provides:

> No shipper, consignor, consignee, forwarder, broker, or other person, or any director, officer, agent, or employee thereof, shall knowingly pay, directly or indirectly, by any device or means, any greater or less or different compensation for air transportation of property, or for any service in connection therewith, than the rates, fares, and charges specified in currently effective tariffs applicable to such air transportation; and no such person shall, in any manner or by any device, directly or indirectly, through any agent or broker, or otherwise, knowingly solicit, accept, or receive a refund or remittance of any portion of the rates, fares, or charges so specified,

tariff. Quite simply, the tariff constituted the entire contract of carriage between the parties. Once respondent transported petitioner's garments, petitioner assumed to pay the tariff and could not circumvent the liability imposed upon it by law in any respect. E.g., New York Cent. & H.R.R. v. York & Whitney Co., 256 U.S. 406, 408 (1921); Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, supra; Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401, 1403 (2d Cir. 1969); Carter v. American Tel. & Tel., 365 F.2d 486, 496 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967); United States v. Associated Air Transport,

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> or knowingly solicit, accept, or receive any privilege, favor, or facility, with respect to matters required by the Board to be specified in such tariffs, except those specified therein.

Inc., 275 F.2d 827, 832-34 (5th Cir. 1960); Slick Airways, Inc. v. United States, 292 F.2d 515, 519 (Ct. Cl. 1961).

Accordingly, respondent's valid federal tariffs, which petitioner concedes are applicable to the shipments at issue, govern not only the nature and extent of petitioner's obligations, but also the nature and extent of petitioner's remedy under 49 U.S.C. § 1506. Any remedy petitioner may possess is defined, as a matter of law, not by the common law, but within the boundaries of respondent's tariffs. New York Cent. & H.R.R. v. York & Whitney Co., supra; North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d at 233, supra.

Although petitioner maintains it does not seek to overturn respondent's lawful tariffs, its "counterclaim bottomed on fraud" seeks to accomplish that

that very purpose. Petitioner asserted below that respondent was guilty of a fraud due to the failure of its agents in Bucharest and Frankfurt to inform petitioner "that the 'unit rate agreement' was improper, in violation of Pan Am's tariff or beyond [their authority to make]." The simple answer to this allegation is that, even if true, it vests no remedy in petitioner as no claim for relief can be predicated on a carrier's alleged fraudulent misquotation of tariff rates or availability of rates outside its tariff. E.g., Consolidated Freightways Corp. v. Terry Tuck, Inc., 612 F.2d 465, 466 (9th Cir.), cert. denied, ___ U.S. ___, 100 S. Ct. 2990 (1980); Aero Trucking, Inc. v. Royal Tube Co., 594 F.2d 619, 622 (7th Cir. 1979); F. Burkhart Mfg. Co. v. Fort Worth & D.C. Ry., 149 F.2d 909 (8th Cir. 1945).

This elementary proposition has been established not only by every Federal court of appeals which has addressed the issue, but by this Court on numerous occasions as well. Starting from the principle that the applicable tariffs are incorporated by law into the contract between the shipper and carrier, this Court has held:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 163 (1922) (emphasis supplied); accord, Kansas City Southern Ry. v. Carl, 227 U.S. 639, 653 (1912) ("Neither the intentional nor accidental misstatement of the applicable published rate will

bind the carrier or shipper"); Louisville & N.R.R. v. Central Iron & Coal Co., 265 U.S. 59, 65 (1924) (no "act or omission of the carrier" can "estop or preclude it for enforcing payment of the full amount" of the tariff charges); Baldwin v. Scott County Milling Co., 307 U.S. 478, 485 (1939) ("equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges"); Texas & P. Ry. v. Abilene Cotton Oil Co., 246 U.S. 426, 446 (1907) (statute preserving common law remedies "cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.")

It is thus obvious that petitioner's attempt to circumvent the conclusive

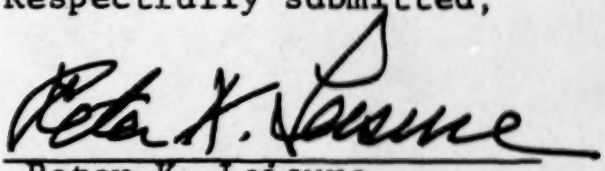
effect of respondent's lawful tariff must fail. This is not a case, as petitioner would have this Court believe, where the shipments were unauthorized or improperly diverted by the carrier. Hewitt-Robins, Inc. v. Eastern Freight-ways, Inc., 371 U.S. 84 (1962). Petitioner concedes that it engaged respondent to transport its goods from Frankfurt to New York and admits that the goods were so transported. In short, petitioner received precisely what it bargained for and became obligated to pay respondent its lawful tariff. As a matter of law, the tariff is both conclusive and exclusive; it may not be added to through reference to outside contracts, agreements, understandings or promises. Any attempt by petitioner to now undermine the conclusive effect of that tariff, whether by pleas of fraud, estoppel or breach of contract, cannot be

invoked to avoid the tariff. The settled proposition that common law right of action survives the enactment of the Federal Aviation Act to attack valid tariff rates is neither unprecedented nor novel and does not warrant review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,



Peter K. Leisure
Attorney of Record
for Respondent
Whitman & Ransom
522 Fifth Avenue
New York, New York 10036
(212)575-5800

Of Counsel:

Allen A. Hans

Jacob Oliner
Oliner & Oliner
535 Fifth Avenue
New York, New York 10017
(212)867-7720

RESPONDENT'S APPENDIX

EXTRACT FROM PRETRIAL DEPOSITION OF JOSEPH BASSO

Q Who was present at that time?

A Mr. Shapiro and Mr. King.

Q And, again, this would be approximately in February of 1976?

A I think so.

Q Was there anyone else present from Pan American during this conference?

A I am not certain if Mr. Gaiculescu was there. Mr. Gaiculescu might have been there at that time.

Q Who is Mr. Gaiculescu?

A He is a Roumanian employee that does our accounting.

He also is knowledgeable with regard to cargo tariffs and tariff manuals, and has been trained in that by Pan American.

Q He is a Roumanian citizen?

A That's right, he is a Roumanian

citizen.

Q You don't recall whether he was present or not?

A No, I don't know. I really don't know.

Q Tell us, as best you can recall, the substance of that conversation?

A At that point we discussed quantities of textiles that were going to be shipped in the coming year for a period of, approximately--at first indication, it was, I believe, from May through the end of the year. And I took notes of the numbers of pieces and different styles, mainly the men's suits, blazers. I don't recall if there were ladies' blazers and men's blazers and pants. I still have most of those notes. And we discussed the unit price.

Mr. Shapiro, at that first meeting, said that there was considerable

tonnage, and that, by indications, that there was--by unit price he could afford at that time was, $1.10 per unit.

I said, I didn't know if it was possible for us to do it for $1.10, and we tried working figures--I know I did, but I am not certain if Mr. Gaiculescu was there--to fit this tariff structure, based on the weights of the garments that they were going to ship.

At that time my notes indicated that we were told the suits would weigh approximately 1.50 kilos, and that the blazers would weigh .7 kilos.

Q Do you know what that translates into in pounds?

A Approximately, a suit would weigh 3.2 pounds and a blazer would weigh 12-1/2 ounces.

Q Was there any discussion --

A I am sorry, no, it is more than

that. It was .7 kilos, so that would be approximately twenty ounces, twenty-one ounces.

Q Was there any discussion that the blazers would be hung with pants on them?

A No, there was no discussion at that point. The blazers were supposed to be shipped towards the end of the year, and that included in the discussion.

I think, in the month of--my notes state--I have some notes I took with me, copies of notes I took.

Q Can we have them please?

A It was to remind myself. Initially, the suits were supposed to be 48,000 suits for July, August, September and October, approximately 12,000 suits a week.

And the blazers were supposed to begin in October, and the numbers I show

in my notes were 80,000 blazers in October, 80,000, November, 80,000, December. These were blazers.

Then there were pants which were also involved. And we were told at that time there was 60,000 in September, 60,000 in October, 40,000 in November, and 120,000 in December.

Q The notes which you have in front of you, are those the notes you made at the meeting?

A No, these are notes that I took before I left Bucharest.

Q Do you have the actual notes that you took?

A Yes, I do.

Q Do you have them with you?

A No, I don't

MR. GALLAGHER: We would like to get a copy of them, Mr. Oliner.

MR. OLINER: You will.

Q These are notes you made from them?

A Yes, everything.

Q I note on there you show 1.25. What is that intended to indicate?

A After I was unable to conclude our negotiations in Bucharest, I am not sure if this is a result of the first meeting, because we had several meetings --

Q When you say first meeting, you are not talking about the airplane meeting?

A No.

Q You are talking now about the first meeting in your office?

A Yes.

Q Let's finish up with that meeting before we go on to the next one.

A Yes.

Q At that meeting, Mr. Shapiro

said he wanted a rate of $1.10 per unit?

A Yes.

Q What was your response to that?

A And thirty cents a unit for the pants. Mr. King seemed more interested in the pants. I don't know if that was his business and the other business was Mr. Shapiro's.

My answer to them was that I wasn't certain whether or not it could fit into our tariff schedule and I would have to do more investigation, looking into it. I didn't propose that we could go any further at that point.

Q During this initial meeting, did you review in any kind of detail the actual tariffs that were on file by Pan American?

A Yes, sir. We mentioned the cargo tariff from Germany, and we also mentioned at that time that there was a

tariff that we thought we could fit this business into from Frankfurt, that there definitely wasn't any way we could fit this business from our Bucharest tariff, because it was too high, it wasn't competitive.

Q I am not sure if I understand you. Do you mean that the tariff itself was too high?

A Yes. There wasn't any tariff covering largish movements of textiles from Roumania. There were tariffs only covering smaller shipments of textiles, and would have been much too high for the importer, for Mr. Shapiro to pay, it wasn't competitive.

Q Did you tell Mr. Shapiro or Mr. King what that tariff was?

A The one from Roumania?

Q Yes.

A Yes, I believe we discussed what

it was. It was two dollars a unit, a kilo.

Q You discussed it in terms of kilos rather than in terms of units?

A That's right. That is the way our tariffs are quoted, in kilos, and not quoted in units.

Q What did you tell them concerning the tariff from Frankfurt?

A I told them there were applicable government order tariffs, or special commodity tariffs from Frankfurt, that would fit his business and put it within the unit cost he was looking for, that I would need more information, because they are not published tariffs in the common tariff manual. They are special tariffs that are usually found in manuals located at the destination points or origin points, which the common carriage encompasses.

Q Did you tell Mr. Shapiro you would look into this further?

A Yes, I did.

* * *

Q How was that second meeting concluded?

A The second or third meeting--well, the next, the second meeting, we concluded that we would go to Frankfurt together and discuss this with our cargo people.

Q Did that, in fact, happen?

A Yes.

Q How long, approximately, after this meeting that you just described for us, did you go to Frankfurt?

A I think we went the next day.

Q Who went?

A Mr. Shapiro and myself.

Q When you arrived in Frankfurt, whom did you meet?

A We met with Mr. Moierer and with with Mr. Muller.

Q Where did that meeting take place?

A That took place in our cargo marketing office at the Frankfurt Airport.

Q And the four of you were present?

A Yes.

Q Now, to go back for a moment, during this second meeting with Mr. Shapiro, did you take any notes at that time?

A Yes, I believe I did.

Q Do you have copies of them with you?

A I don't have them with me, no. I can get you those copies. They are just scratched out, mostly dealing with the tariff and averaging out the weights

versus piece counts, et cetera.

Q Can you tell us, to the best of your recollection, what transpired at this meeting in the Frankfurt Airport?

A We went over the proposed figures, the quantities to be shipped, and the weights.

And we discussed the applicable thirty ton tariff and fifteen ton tariff. And we told Mr. Shapiro that we couldn't carry the suits for $1.10, but that--I think we asked initially $1.40 or $1.35, and then we compromised at $1.25, with Mr. Shapiro's assurance that the lighter garments would average out the weights and fit within the tariff that we were working with.

Q What was the tariff that you were working with in connection with the $1.25?

A The tariff we were working with,

I believe, was two Marks twenty.

Q Per kilo?

A Per kilo, that's right.

Q Is that the fifteen ton or thirty ton tariff?

A At that time I believe it was the thirty ton tariff. I have to review the tariffs to be sure of that.

Q You said earlier that these are some sort of special tariffs.

A That's right.

Q They are not generally available to the public?

A They are available to the public, but they are not published within the tariffs all over the world, they are published within the geographical area specifically.

They wouldn't have any value outside of Europe, for example, so they wouldn't be published outside of Europe.

Q How do you describe these tariffs?

A They are special commodity tariffs, filed by government to government, and they are to cover the movement of large quantities of a specific item of a specific nature.

Q Do you have flexibility in determining what the rate is that you will charge when you ship goods under this tariff?

A No. It is quite clearly defined that, in most cases, you have different weight trucks--give ton applicable tariff under a specific commodity, ten ton, twenty ton, maybe even thirty.

However, that changes. The changes usually are seasonal changes. And, each time it changes the government is required to file it with the other government, the corresponding government.

Q These are all tariffs, Germany to the United States?

A Yes. And, many times from the United States to Europe, and specifically commodity rates as they are called.

Q You are talking about shipments all going one way, you are not talking about any shipments going any other way?

A No.

Q There is no flexibility?

A No.

Q Then, how was it you were able to adjust the price from what was the original payment of $1.40 or $1.35, down to $1.25, that was eventually agreed upon?

A Because of the nature of the goods, and Mr. Shapiro's assurances that we would receive the lighter weight goods towards the end of the year, namely, the blazers, and the quantities of blazers,

and pants, trousers, which helped us to average out the price to $1.25.

Q The discussions at this time related to unit prices?

A That's right. That was mainly for the convenience of the importer. They needed, you know, to keep it within the unit cost, to, of course, to sell to their customers, I guess. It's easier to do that than to sell them cargo by kilo.